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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

RODOLFO VELASQUEZ et al.,

Plaintiffs and Appellants,

v.

JUAN JOSE TELLECHEA et al.,

Defendants and Respondents.

A097319

(Alameda County  
Super. Ct. No. H 210619-9)

Plaintiffs Rodolfo Velasquez and Alberto Carrillo appeal from a judgment entered in favor of Jose Tellechea, the Administrator of the Estate of Juan Jose Tellechea (the Administrator), after the court sustained a demurrer to plaintiffs' third amended complaint without leave to amend.

We affirm.

**BACKGROUND**

Juan Jose Tellechea owned property located at 1550 Pacific Avenue, San Leandro. Mr. Tellechea died in September 1996. On December 2, 1999, plaintiff Rudolfo Velasquez filed a complaint naming Mr. Tellechea as defendant, alleging that he had paid \$7,341.39 in delinquent taxes on the property for the years 1996, 1997 and 1998 (actually, according to documentation submitted by Mr. Velasquez, for the tax years 1996/1997, 1997/1998 and 1998/1999). Mr. Velasquez sought relief in the form of some kind of security interest in the property, or, in the alternative, reimbursement of the money paid by him to satisfy the tax delinquency.

By the time the third amended complaint was filed, on July 2001, the situation had changed somewhat. Alberto Carrillo, who allegedly resided on the property, had joined the action as a party plaintiff.<sup>1</sup> Mr. Tellechea's estate was being administrated, and the Administrator, on March 19, 2001, had filed an unlawful detainer action against plaintiffs. The two matters had been consolidated. Mr. Velasquez had paid property taxes for the 1999/2000 and 2000/2001 tax years. Plaintiffs, however, no longer sought reimbursement of the money paid by Mr. Velasquez as property taxes. They sought title to the property on a theory of adverse possession.

On August 31, 2001, the court sustained the Administrator's demurrer to the third amended complaint without leave to amend, and ordered that the action be dismissed, ruling that plaintiffs' previous pleadings precluded their claim for title on a theory of adverse possession.<sup>2</sup> On November 1, 2001, judgment was entered in favor of the Administrator. On the same day, the court denied plaintiffs' request for reconsideration.

Plaintiffs filed a premature notice of appeal on October 31, 2001, but filed the same notice of appeal again on November 19, 2001. Plaintiffs assert that they are appealing from an order and judgment demurring to their action, but we construe the notice as taking an appeal from the judgment entered against them after the demurrer was sustained without leave to amend.

## **DISCUSSION**

### **I.**

#### **Demurrer**

"A demurrer tests the sufficiency of the plaintiff's complaint, i.e., whether it states facts sufficient to constitute a cause of action upon which relief may be based.

[Citations.] In determining whether the complaint states facts sufficient to constitute a

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<sup>1</sup> The original and first amended complaint alleged that Mr. Velasquez resided in San Francisco. The second and third amended complaints alleged that Mr. Velasquez resided with Mr. Carrillo at 1550 Pacific Avenue, San Leandro.

<sup>2</sup> Plaintiffs also sought damages for misrepresentation, bad faith, and fraud. They do not contend on appeal that the court erred in sustaining the Administrator's demurrer to those causes of action without leave to amend, and we do not consider that possibility.

cause of action, the trial court may consider all material facts pleaded in the complaint and those arising by reasonable implication therefrom; it may not consider contentions, deductions or conclusions of fact or law. [Citations.] The trial court also may consider matters of which it may take judicial notice. [Citations.]” (*Young v. Gannon* (2002) 97 Cal.App.4th 209, 220.) When documents have been incorporated by reference into the complaint, the recitals in the documents, if contrary to allegations in the pleading, will be given precedence, and the pleader’s inconsistent allegations as to the meaning and effect of an unambiguous document will be disregarded. (*Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 720, overruled on another point in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, fn. 10.) “We independently review the complaint to determine whether it states a cause of action and whether defects can be cured by amendment. The burden of proof is squarely on the plaintiff, and if there is no liability as a matter of law, leave to amend should not be granted. [Citations.]” (*Id.* at p. 721.)

In determining the sufficiency of a pleading, a court considers any inconsistencies between the facts pleaded—or omitted—and those alleged in prior pleadings filed by the plaintiff in the same suit. Therefore, although both the trial court and a reviewing court must assume the truth of the factual allegations of the complaint, “[A]n exception exists where a party files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings. [Citations.] In these circumstances, the policy against sham pleading permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If he fails to do so the court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint. [Citations.]” (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383-384.)

## II.

### Title by Adverse Possession

A party seeking to obtain title to property on a theory of adverse possession must prove “(1) possession under claim of right or color of title,<sup>[3]</sup> (2) actual, open and notorious occupation of the premises, constituting reasonable notice to the true owner; (3) possession which is adverse and hostile to the true owner; (4) continuous possession for at least five years; and (5) payment of all taxes assessed against the property during the five-year period.” (*Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1305.)

Two additional principles are particularly relevant here.

First, mere occupation of the premises does not satisfy the requirement that the occupation be adverse and hostile. “It is, of course, elementary that in cases of this character the asserted hostile claim must be manifested to the true owner. The owner must be informed in some way that the possession is hostile, or the statute does not operate against his right. The object of the statute in defining the acts essential to constitute an adverse possession is that the real owner may by unequivocal acts of the disseisor have notice of the adverse holding, and be thereby called upon to assert his legal title [citation]. The owner will not be condemned to lose his land because he has failed to sue for its recovery where he has no notice that it is held or claimed adversely, but the statute cuts off his remedy only when he has neglected to commence his action within the period assigned for it [citation]. Hostile occupancy consists of two elements: First, hostile intent in the mind of the adverse claimant, coupled with, second, knowledge on the part of the owner. These two elements must be present to support a claim of hostile occupancy. It is, therefore, not sufficient that the claim of right exist only in the mind of the person asserting it. It must be manifested in such manner that the owner has knowledge thereof [citation].” (*Gas & E. Co. v. Crockett L. & C. Co.* (1924) 70 Cal.App.

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<sup>3</sup> Plaintiffs assert that they possessed the property under color of title. As a possessor holds under color of title only when possession is founded on a written instrument, judgment or decree (*Buic v. Buic* (1992) 5 Cal.App.4th 1600, 1604), and as plaintiffs never have claimed that their possession was founded on a written document, we take plaintiffs to mean that they seek title under claim of right.

283, 289.) “The possession must be actual, open and notorious, and exclusive.” (*Machado v. Southern Pacific Transportation Co.* (1991) 233 Cal.App.3d 347, 362.) “ ‘The element of “hostility” means, not that the parties must have a dispute as to the title during the period of possession, but that the claimant’s possession must be adverse to the record owner, ‘unaccompanied by any recognition, express or inferable from the circumstances, of the right in the latter.’ ” [Citation.]’ [Citation.]” (*Buic v. Buic, supra*, 5 Cal.App.4th at p. 1605.)

In addition, the filing of an action contesting the claimant’s right to the property has the effect of interrupting the continuous-possession element of adverse possession. (*California Maryland Funding, Inc. v. Lowe* (1995) 37 Cal.App.4th 1798, 1803-1804.) It follows that for purposes of plaintiffs’ ability to obtain title on a theory of adverse possession, the five-year statutory period effectively terminated on March 19, 2001, when the Administrator filed the unlawful detainer action. In other words, in order to obtain title on a theory of adverse possession, plaintiffs would have to show that they manifested an intention to claim ownership of the property in a manner hostile to that of the true owner for a five-year period that ended on March 19, 2001.<sup>4</sup> They also would have to show that they paid five years of property taxes during that same time period.

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<sup>4</sup> In fact, as respondent points out, the filing of an action to quiet title by adverse possession effectively tolls the five-year period. (*California Maryland Funding, Inc. v. Lowe, supra*, 37 Cal.App.4th 1798, 1803-1804.) The original complaint in these proceedings was filed on December 2, 1999. Plaintiffs argue that the rule does not apply here, pointing out that their original complaint, although seeking an interest in the property, also sought reimbursement of amounts paid as property taxes. It follows, in their opinion, that their own action could not have tolled the statutory period as it did not actually seek a change in possession. (See *California Maryland Funding, Inc. v. Lowe, supra*, 37 Cal.App.4th at p. 1804, recognizing that an unsuccessful action leading to no change of possession does not toll the statutory period.) We need not consider the merits of this argument (although by the time of their second amended complaint appellants clearly were seeking a change in possession). For purposes of this appeal, it is enough that the five-year period terminated, at the latest, on March 19, 2001.

### **III.**

#### **Plaintiffs' Allegations**

Plaintiffs' third amended complaint alleged that their title was based on their "actual, open, notorious, exclusive, hostile, and adverse possession of the Property for five years preceding the commencement of the action, together with [their] payment of all taxes assessed against the Property for same period of time of five years." Plaintiffs did not allege facts supporting their claim. For example, they did not state when they first possessed the property, or what facts disclosed that their possession was exclusive, hostile and adverse. These defects, however, could be cured by amendment. The more serious problem is that plaintiffs' previous pleadings, coupled with the documents attached by them to their pleadings, and with matters of which the court was entitled to take judicial notice, establish that they will be unable to amend their pleadings to state facts that would allow them to obtain title to the property on a theory of adverse possession.

One fatal defect in plaintiffs' case concerns the payment of taxes. In order to prevail, plaintiffs would have had to have paid five years of taxes on the property before March 19, 2001, when the filing of the unlawful detainer suit effectively terminated the five-year statutory period. Although plaintiffs alleged in the third amended complaint that they had paid five years of taxes, their previous pleadings, and the documents attached to their pleadings, established that the first delinquent taxes paid were for the 1996/1997 tax year. It followed that in order to prevail, plaintiffs would have had to have paid taxes for the years 1996/1997, 1997/1998, 1998/1999, 1999/2000 and 2000/2001 before March 19, 2001. The tax documents submitted by them, however, established that the 2000/2001 taxes were not paid until April 10, 2001. In short, they paid only four years of taxes by March 19, 2001.<sup>5</sup>

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<sup>5</sup> Plaintiffs later submitted tax records for the 1995/1996 year. These records, however, confirm that taxes had been paid for those years at the time they were due. They do not show that plaintiffs paid the taxes, but instead suggest that Mr. Tellechea, who was then alive, paid the taxes on his property. In any event, any suggestion that plaintiffs paid taxes for the 1995/1996 year is refuted by the allegations of their original,

A second fatal defect lies in the allegation made by plaintiffs in their second amended complaint, that they “were allowed by Juan Jose Tellechea to move [onto] the [subject] property.” Permissive use is not hostile use. Plaintiffs also alleged that Mr. Tellechea lived on the property himself until “mid-1996.” Plaintiffs’ possession, therefore, could not have become exclusive until Mr. Tellechea left, and the five-year period, therefore, would not expire until mid-2001. The March 19, 2001 filing of the unlawful detainer action again terminated the period of alleged adverse possession before the expiration of the requisite five years.

Plaintiffs, cognizant of the need to explain the inconsistencies between their second and third amended complaints, submitted the following unverified “statement of fact”:

“Mr. Juan Tellechea was a very socially active person ever since Alberto Carrillo knew him for the last 18 years. Mr. Tellechea around 1994 and early 1995 increased his social activities and social parties and drinking, his prolong absence from the house, left, space for Alberto Carrillo to squat into the back yard of the house, due to Alberto’s financial troubles, eventually into the main house permanently. Mr. Tellechea spent long period of time in Los Angeles and in San Francisco, or somewhere else.

“Around 1995, Rodolfo Velasquez commented to Alberto, that his two-bedroom house in San Francisco was packed with parents, brothers and sisters, nephews, nieces and he needed larger space. Mr. Carrillo invited Velasquez to 1550 Pacific Avenue in early 1995.

“When Velasquez and Carrillo were preparing the complaint, they just without thinking disclosed that Juan Jose Tellechea gave them permission to get into the property. What Velasquez Carrillo meant was, Alberto had been visiting Mr. Juan Jose Tellechea for the last 18 years or so. Mr. Tellechea never told Carrillo to stay or leave. On early

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first amended complaint and second amended complaint, where they allege that they paid delinquent taxes in the amount of \$7,314.39—a figure representing the taxes due for the 1996/1997, 1997/1998 and 1998/1999 tax years.

1995, Carrillo went to visit him as usual with the intention to ask permission to stay, fortunately it was not necessary because Mr. Tellechea was not home, however, Carrillo could occupy the back yard where he kept several cars parked there, however Carrillo was able to occupy in early 1995 one of those, or a cottage on the very rear of the yard.”<sup>6</sup>

Even if this statement were to be accepted as true, it does not establish or even suggest that plaintiffs can show that their occupancy was hostile and under a claim of right. To the contrary, it shows that Mr. Tellechea had allowed Mr. Carrillo to live on the property from time to time, and that Mr. Carrillo assumed that Mr. Tellechea would give him permission to live on the property again. In other words, the statement is consistent with the allegations of the second amended complaint, but not with the allegations of the third amended complaint, and provides no basis for accepting the allegations of the latter over those of the former.

Plaintiffs point out, correctly, that the fact that possession was permissive at one time does not necessarily defeat a claim of adverse possession. The rule was stated in *Machado v. Southern Pacific Transportation Co.*, *supra*, 233 Cal.App.3d 347, 362. “[O]ne who uses land by consent may effect an ouster by ‘unqualified and definite renunciation of subordination to the owner’ even though the subsequent use is identical to the uses prior to renunciation. [Citation.] Such renunciation must be of sufficient clarity to put the owner on notice of the adverse claim to title. [Citation.]” Appellants have not alleged any facts suggesting that they renounced their permissive use of the property in any manner that provided notice to Mr. Tellechea, or to his heirs, of their renunciation.

At best—from plaintiffs’ perspective—the pleadings might be amended to show that plaintiffs claimed a right adverse to Mr. Tellechea’s heirs. As Mr. Tellechea died in September 1996, however, the period of adverse occupancy would not expire until September 2001. The Administrator filed the unlawful detainer action in March 2001, before the expiration of the statutory period. It also is true that the only allegation that

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<sup>6</sup> This statement was supplemented by another statement filed by Carrillo on November 1, 2001, where he confirmed his intention to ask Mr. Tellechea’s permission to stay in his house, but, finding that Mr. Tellechea was not home, moved into a car parked in the back yard.



might be construed as providing notice to the heirs that what had been a permissive use had become hostile, is the allegation that Mr. Velasquez paid the delinquent property taxes. It is settled, however, that payment of taxes does not alone announce an intention to possess the property in a manner hostile to that of the owner. (*Machado v. Southern Pacific Transportation Co.*, *supra*, 233 Cal.App.3d at p. 362.) In any event, Mr. Velasquez did not pay the taxes until November 18, 1999, less than two years before the Administrator filed the unlawful detainer action.

### CONCLUSION

Plaintiffs have not alleged facts entitling them to recover on a theory of adverse possession, and, their pleadings establish that they did not and cannot show hostile possession and payment of taxes for the five-year statutory period. The trial court correctly granted the demurrer to plaintiffs' third amended complaint without leave to amend.

The judgment of dismissal is affirmed.

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Stein, J.

We concur:

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Marchiano, P.J.

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Margulies, J.